No. 82-1815

In The

# Supreme Court of the United States

October Term, 1983

ELIZABETH EKEN AND WILLIAM JOHNSON,
As Representatives of the Class of Investors
Defrauded by Trenton H. Parker and
International Mining Exchange, Inc.,

*Petitioners,*

vs.

INTERNATIONAL MINING EXCHANGE, INC.,
TRENTON H. PARKER, et al.

UNITED STATES

vs.

TRENTON H. PARKER and INTERNATIONAL
MINING EXCHANGE, INC.

ELIZABETH EKEN and WILLIAM JOHNSON,
As Representatives of the Class of Investors
Defrauded by Trenton H. Parker and
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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## REPLY BRIEF

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## REPLY BRIEF

### REPLY TO THE GOVERNMENT'S STATEMENT OF THE CASE

There are a number of ambiguities and omissions which appear in the "Statement" section of the govern-

ment's brief in opposition for a writ of certiorari. Several are material and are worthy of clarification.

First, the government's brief fails to mention that it was the investigation which was conducted on the part of the class action which located the funds of defrauded investors. The government's brief fails to mention that it was the order of the United States District Court for the District of New Jersey which blocked an attempt by defendants to transfer those funds out of possible reach. The government's brief fails to mention that the plea of defendants came only after the United States District Court for the District of New Jersey had, in effect, seized the funds in question for the benefit of the class of investors defrauded by Trenton Parker and International Mining Exchange, Inc.

The government's brief fails to note that transfer of funds to the control of the criminal court was to be transitory in nature, done to merely effectuate speedy physical transfer to the United States and that at no time did the government ever disclose to the judge hearing the class action that it intended to later argue that by entering an Order permitting transfer the civil court had lost jurisdiction over the funds in question.

Perhaps even more importantly, the government does not disclose in its brief that the recovery, significant as it was, was merely a fraction of the total amount stolen from investors.[1] The government's brief makes a brief

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[1] The recovery represents slightly over 50% of the amount thus far identified thru the class action as having been stolen from investors. The class action litigation is continuing to vigorously pursue other potentionally liable, a task complicated immensely by the usurpation by the criminal court.

allusion in a footnote, but does not make clear, that the class action continues to collect funds for investors, both by tracking down additional foreign depositories of the convicted defendants and by continuing to prosecute the civil action against others liable. This includes, but is not limited to the recovery of some $400,000.00 in a foreign bank account, the ownership of which was consistently denied by the convicted defendants.

The government's brief fails to make clear that, Mr. Parker's plea was not conditioned upon the creation of a receivership in the criminal action, and that the criminal receivership was created only after Parker's plea.

The government's brief fails to make clear that the funds recovered quite literally did not belong to the convicted defendants, but rather to the defrauded investors who made up the class. The government's brief fails to note that not one of the defrauded investors (who are the owners of the funds) have supported the creation of a receivership from the criminal court and, indeed, the continuation of the receivership has been opposed by not only the class representatives, but by other defrauded investors as well.

Finally, the brief of the government fails to point out that despite several stays issued by the United States Court of Appeals for the Tenth Circuit Court issued at the request of defrauded investors the receivership in the criminal action has already caused the expenditure of $100,000.00,[2] most of which have gone to receiver's and at-

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[2] The propriety of these expenditures in light of the stays issued by the Tenth Circuit is open to question and is the subject of certain requests for writs of prohibition pending before the Tenth Circuit.

torneys fees. The government fails to note that these expenditures, as well as future expenditures if the criminal receivership is allowed to stand, are totally unnecessary since the efforts by the receiver to identify investors are needlessly duplicative of the activities conducted on behalf of the class action.[3]

All of the above are salient factual points. None were addressed in the government's brief.

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## REPLY TO THE GOVERNMENT'S ARGUMENT

The general approach taken in the brief submitted by the government in opposition to the petition for writ of certiorari is to attempt to avoid rather than respond to the arguments advanced in the petitions. However, where the government does advance legal argument, its legal assertions prove to be incorrect and merit correction. Ironically, many of the cases cited by the government, when reviewed, actually support the position taken by the class.

The implication of the government's brief is that the issue sought to be raised is the permissability of an Order of restitution emanating from a criminal court. That is not at all an issue. What is at issue is the creation and continuation by a criminal court of a receivership over the express objection of the representatives of the individuals on whose behalf the receivership was purportedly

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[3] Incredibly, the criminal receivership has repeatedly refused to take action to exchange lists of investors with counsel in the class action.

created. What is at issue is the supercission of and interference with the normal and appropriate civil processes by a court hearing a criminal case.

The government asserts that the criminal court's action in appointing a receiver represents, "no departure from settled practice. . . ." (Government's brief at 8). That assertion is simply inaccurate. There is no precedent in the annals of American jurisprudence for the creation of a receivership by a criminal court, much less any precedent where, as here, there already existed a civil proceeding which had first exercised jurisdiction over the funds in question. The cases relied upon by the government as precedent, far from supporting its position, actually support that of petitioners. The primary case cited by the government, *United States v. Roberts,* 619 F. 2d 1 (7th Cir. 1979) is one in which a passing reference was made in a *per curiam* opinion to a receivership which was ultimately to effectuate restitution. However, as the record in the *Roberts* case shows and as Judge Kane noted in his opinion below, there was no receiver appointed by the judge hearing the criminal case of *United States v. Roberts.* The receivership referred to in the Seventh Circuit's opinion was appointed in a pre-existing *civil proceeding* by another federal judge. The trial judge in *Roberts,* did no more than direct the defendant to cooperate with the receivership emanating from the civil action. Thus, the procedure sanctioned by the Seventh Circuit is precisely the procedure which petitioners contend should have been followed in this matter. Consequently it is undeniable that the government's reliance on *United States v. Roberts* is wholly misplaced.

Similarly, the government's reliance on *United States v. Boswell,* 565 F. 2d 1338 (5th Cir.), *cert. den.,* 439 U. S. 819 (1978) is also completely in error. Again a receivership is mentioned in the circuit court's opinion, but had the history of the case been fully reviewed, the government would have discovered that the task of identifying defrauded investors was being carried out not by a probation officer as asserted, or by a receiver appointed in a criminal case, but by a receiver appointed by a civil court in a pending state action. 565 F. 2d at 2. It further appears that the funds were to be distributed to investors either through the civil receivership or at the direction of the receiver appointed by the civil court. Thus, though *Boswell* is primarily concerned with other matters, to the extent that it involves a receivership it too supports the position put forth by petitioners.[4]

To the extent applicable, even *United States v. Barrington,* (No's. 82-5017 and 82-6159) (4th Cir. June 16, 1983), cited by the government, supports the petitioners. In *Barrington,* the Fourth Circuit supported the creation of a trust fund by a restitutionary order. But, the fund was to be distributed through civil litigation, not through the criminal courts. Thus, any reliance by the government on this unreported case is totally unjustified.

This court has admonished that the creation of receiverships is "to be watched with a jealous eye lest their function be perverted." *Kelleam v. Maryland Casualty Co.,* 312 U. S. 373, 381 (1941). It has admonished the low-

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[4] It appears that the defendant in *Boswell* did not make the required restitution. See *United States v. Boswell,* 605 F. 2d 171 (5th Cir. 1979).

er courts that the appointment of a receiver is an extraordinary action and that restraint should be exercised in their creation. E. g., *Kelleam v. Maryland Casualty Co.*, supra; *Gordon v. Washington,* 295 U. S. 30 (1939). In light of these admonitions, there is one omission in the government's brief which is glaring. Nowhere in that brief is there any explanation offered as to why the practice undertaken for the first time below is either necessary or even why it is desirable. It is submitted that there is good reason for the omission, for the practice is neither necessary nor desirable. There is no reason which can possibly be advanced for the unnecessary expense, duplication and confusion caused by the creation of a receivership from the criminal action.

The funds under the control of the receiver are funds actually belonging to the class of the investors defrauded. The duly authorized class representatives have consistently opposed the receivership. Not a single investor of the approximately 1,200 known to have been defrauded has come forward to support the perpetuation of the receivership arising from the criminal court. Thus, the very individuals for whom the receiver is purporting to act have made it clear that they feel the receivership should be terminated.

It is not an overstatement to assert that at stake in this case is the very perception of the federal court system as a just organ for dispute resolution. The federal courts have been given specified statutory powers to wield where they must in order to resolve legal issues. However, the accretion of power is not an end in itself. Similarily, as this court has specifically stated, "a receivership is only a means to reach some legitimate end sought

through the power of a court of equity. It is not an end in itself." *Kelleam v. Maryland Casualty Co.*, 312 U. S. at 381, quoting *Gordon v. Washington*, 295 U. S. at 37.

Yet, the government does not dispute in its brief that the receivership arising from the criminal court is without necessity. Thus, its perpetuation, if permitted by this court, would only be for its own sake and creates a precedent which will significantly, and detrimentally, alter the respective roles of criminal and civil courts in the federal system.

## CONCLUSION

The government has not even attempted to rebut many of the arguments advanced in these petitioners' original submission concerning why this case presents an important issue which should be dealt with by this court. There was no attempt to convince the court that there existed any necessity whatsoever for the appointment of a receiver by the criminal court or that the civil court, which first seized and protected the assets recovered should not be permitted to manage and distribute those assets and thereby avoid duplication of cost, confusion, and the potential for conflict between federal district courts.

The thrust of the government's argument, insofar as these petitioners are concerned, is that the action by the courts below represent no departure from precedent. However, when the cases cited by the government are reviewed they show that not only do the cases cited fail to support

the government's position but that they actually support the position of these petitioners that the creation of a receivership from the criminal court is unprecedented, entirely unnecessary and is undesirable.

The guidance of this court is desperately needed. It is, therefore, respectfully urged that the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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